INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
State statute in question	2
Nature of case and rulings of the Court	3
Statement of grounds thought to be substantial	6
When and where federal questions raised	8
Exhibit "A"—Opinion of the Supreme Court of Arkansas	10

Table of Cases Cited

Byers v. *Meridian Printing Co.*, 84 Ohio St. 408, 95 N.E. 917, 38 L.R.A. (NS) 913	5
Hawkins v. *Bleakley*, 243 U. S. 212	5
Mobile, etc., Railroad Co. v. *Turnipseed*, 219 U. S. 35	5
Vestal v. *City of Little Rock*, 54 Ark. 321	6

Statutes Cited

Act of the Arkansas Legislature of March 9, 1875, Section 84, No. 1 (Section 19-307, Arkansas Statutes 1947)	2
Constitution of the United States, 14th Amendment	8
Judicial Code, Section 237(a)	1

IN THE SUPREME COURT OF ARKANSAS

No. 4-9320

NEILL C. MARSH, JR., J. L. TURNER, ALTON W. HERRIN, PAUL HARRELL, RED SLAUGHTER, BILL BURROW, W. L. SIMPSON, D. C. DAVIS, JAMES BRASHEARS, JESSEE R. ROSS, C. L. KEDWELL, WILLIE FORD, DR. J. W. MILLER, CLYDE BRANTLEY, E. W. HARGETT, LONNIE F. TATE AND J. F MELLOR, *Appellants,*

vs.

CITY OF EL DORADO, ARKANSAS, *Appellee*

JURISDICTIONAL STATEMENT

(a)

Statutory Provisions to Sustain Jurisdiction

This appeal is sought under the jurisdiction and authority of Section 237 (a) of the Judicial Code (Title 28) which provides:

> "A final judgment or decree in any suit in the highest court of the State in which a decision in the suit could be had, where it is drawn in question the validity • • • of a statute of any State, on the ground of its being repugnant to the Constitution • • • of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal. • • •."

There is drawn in question in this case, the validity of an act of the Legislature of the State of Arkansas on the ground of its being repugnant to the Constitution of the United States. The decisions of the courts of Arkansas, other than the County Court of Union County, Arkansas, are in favor of the validity of the Statute. Under the above quoted portion of the Judicial Code of the United States, the Supreme Court of the United States apparently has jurisdiction to entertain an appeal.

(b)

State Statute in Question

The statute of the State of Arkansas, the validity of which is involved in this case, is Section 84, Act March 9, 1875, No. 1. The statute is also published as Section 19-307, Arkansas Statutes 1947, a publication lawfully authorized by the State of Arkansas. The statute in question is as follows, quoting the statute as published in Section 19-307, Arkansas Statutes 1947, to-wit:

"19-307. ANNEXATION PROCEEDINGS BY MUNICIPALITY—ELECTION—PETITION—PROCEDURE.—When any municipal corporation shall desire to annex any contiguous territory thereto, lying in the same County, it shall be lawful for the Council to submit the question to the qualified electors at least one month before the annual election. If a majority of the votes cast on that question shall be in favor of annexation, the said corporation shall present to the County Court a petition praying for such annexation. The like proceeding shall be had on said petition as is prescribed in thirty-fifth (35) thirty-sixth (36) and thirty-seventh (37) sections (Sec. 19-101—19-103) of this act, so far as the same may be applicable, and if within thirty (30) days after a transcript shall be delivered as provided, no notice of a complaint against such annexation shall be given, at the end of said thirty (30) days (and in case of any such complaint, then after the end of thirty (30) days

after the dismissal of said complaint), the territory shall, in law, be deemed and taken to be included in and shall be a part of said corporation, and the inhabitants thereof shall, in all respects, be citizens thereafter of said municipal corporation, and the County Clerk shall make out and certify to the City or Town Council and the Secretary of State the transcripts provided for in the preceding section. (Act. Mar. 9, 1875, No. 1, Sec. 84, p. 1; C. & M. Dig., Sec. 7458; Pope's Dig., Sec. 9501.)"

(c)

Dates of Judgment and Application for Appeal

A judgment of the Union County, Arkansas, Circuit Court, dated December 14, 1949, sustained the validity of the statute above quoted. Such judgment, within the time allowed by law, and pursuant to law, was appealed to the Supreme Court of Arkansas. The Supreme Court of Arkansas rendered a decision affirming the judgment of the Union County, Arkansas, Circuit Court on October 30, 1950. Within the time allowed by the rules of the Supreme Court of Arkansas a petition for rehearing was filed and submitted to the Supreme Court of Arkansas, and the rehearing was denied on November 27, 1950. This application for appeal is submitted on December 1st, 1950.

(d)

Nature of Case and Rulings of the Court

This case involves the efforts on the part of the City of El Dorado, Arkansas, to annex certain contiguous territory, and the remonstrance of appellants, who reside and own property in the contiguous territory sought to be annexed. The City of El Dorado, Arkansas, instituted a proceeding under the above quoted state Statute by a resolution of the City Council of El Dorado, Arkansas, passed and ap-

proved February 24, 1949. At a general election in the City of El Dorado, Arkansas, held April 5, 1949, the question of annexation was submitted to the electors within the City only. Anticipating the Arkansas Courts would follow a previous rule that the affirmative vote of the electors within the municipality would create a prima facie or presumptive case for annexation, appellants in their remonstrance against the petition of the City of El Dorado for annexation, among other grounds in opposition to such petition, alleged that they were denied the benefits of provisions of the Fourteenth Amendment to the Constitution of the United States because they were denied the right and privilege to vote upon the question of annexation, which within itself, depending upon the affirmative vote of a majority made a prima facie or presumptive case for annexation. By a judgment rendered in the Union County, Arkansas, County Court, appellants' contentions in that respect were sustained, and the petition of the City of El Dorado dismissed.

Petitioner, City of El Dorado, appealed to the Circuit Court of Union County, Arkansas, in which court, under the law of Arkansas, a trial de novo was had. Appellants there relied upon their remonstrance previously filed and there objected to being required to assume the burden of disproving the right of the City of El Dorado to annex the territory involved. Appellants' objections were overruled and exceptions saved. Upon the completion of the trial, the Union County, Arkansas, Circuit Court held against appellants' remonstrance and entered judgment annexing the territory. Within the time allowed by the Circuit Court, appellants presented a motion for a new trial. Among other grounds alleged for a new trial, appellants alleged the trial court erred in holding that the burden of proof was upon remonstrants for the reason that the Legisla-

ture of the State of Arkansas is prohibited by the Fourteenth Amendment to the Constitution of the United States from making the affirmative vote of a majority of the electors of the City of El Dorado, Arkansas, a presumption of existing facts necessary to annex the territory involved, and should have required the petitioner to prove by a preponderance of the evidence, facts necessary to show the right to annex the territory. In the motion for a new trial appellants also alleged that the court erred in holding that the statute required the question of annexation to be submitted to the electors of the municipality, and because the court erred in not holding that the statute required the question of annexation to be submitted to the electors of the territory sought to be annexed. The motion for a new trial was in all respects overruled by the trial court. An appeal to the Supreme Court of Arkansas was duly and seasonably perfected.

In the Supreme Court of Arkansas appellants urged that the Legislature of Arkansas cannot by law make an affirmative vote of the electors of a municipality a presumption of existing facts necessary to the annexation of adjacent territory and to do so is without constitutional sanction. The Supreme Court of Arkansas held against appellants' contentions in such respect, and specifically held that the statute in question is constitutional.

(e)

Citation of Cases to Sustain Jurisdiction

It is believed that the cases of *Hawkins* v. *Bleakley*, 243 U. S. 212, and *Mobile etc. Railroad Company* v. *Turnipseed*, 219 U. S. 35, sustained the jurisdiction of this cause. The case of *Byers* v. *Meridian Printing Co.*, 84 Ohio St. 408, 95 NE. 917, 38 L. R. A. (NS) 913 is authority in this question.

The question raised by this appeal is the antithesis of the cited cases, as it is contended by appellants that there is no rational connection between the affirmative vote of a majority of the electors within the City of El Dorado and the ultimate fact, or facts presumed, and in the inference of the fact necessary to annex from proof of the affirmative vote of a majority of electors is so unreasonable as to be a purely arbitrary mandate. It is also contended by appellants, that under the guise of regulating the presentation of evidence, the procedure operates to deny to appellants and others similarly situated the consideration of evidence in their behalf.

(f)

Statement of Grounds Thought to Be Substantial

In the case of *Vestal* v. *City of Little Rock*, 54 Ark. 321, the Supreme Court of Arkansas held that lands may be annexed when the following appeared:

(1) When they are platted and held for sale or use as town lots;

(2) Whether platted or not, if they are held to be bought on the market and sold as town property when they reach a value corresponding with the views of the owner;

(3) When they furnish the abode for a densely-settled community or represent the actual growth of the town beyond its legal boundary;

(4) When they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulation; and,

(5) When they are valuable by reason of their adaptability for prospective town uses, but the mere fact that their

value is enhanced by reason of their nearness to the corporation, would not give ground for their annexation, if it did not appear that such value was enhanced on account of the adaptability for town uses.

In that case the court also decided that lands might not be annexed when the following appeared:

(1) When they are used only for the purposes of agriculture or horticulture, and are valuable only on account of such use; and,

(2) When they are vacant and do not derive special value from their adaptability for city uses.

The above rule has been followed since the decision was rendered. Unless appellants' land met some one of the requirements for annexation, it might not be taken into the City. The right to be left out is a substantial right, as the taking of property into the City limits will cause increase in taxes, and limit, to some extent, the uses of the land. The affirmative vote of the majority of electors within a City has no rational relation whatever to the existence or non-existence of the facts necessary to legally annex contiguous territory.

It has long been the rule for the Supreme Court of Arkansas that if any substantial testimony supports the judgment of the trial court in cases of this kind, the Supreme Court will affirm such a decision. The trial courts of course know the rule; therefore, it is unnecessary for the trial court to determine by a preponderance of the evidence, or any weight of the evidence, that the facts necessary to annex exist. The trial court must only determine whether there is any substantial testimony at all tending to support any one of the 5 grounds for annexation. All that the Supreme Court of Arkansas will

look for in a case of this kind, is any substantial testimony, tending to support the trial court's decision.

The interest of the electors within the municipality being casual, or one of ambition for the municipality, will naturally vote in the affirmative whether or not the contiguous territory meets the requirements of law for annexation. The Trial Judge, who fills a political office, has only to determine the existence of any substantial testimony to support a judgment either way, and is in practical effect, free to decide any way that political expediency indicates. Political expediency in most cases is with the larger number.

Appellants can point to no decision involving a similar question, and the cause appears to be one of first impression and can only be determined upon analogous cases.

(g)

When and Where Federal Questions Raised

In appellants' remonstrance to the petition filed by appellee in the County Court of Union County, Arkansas, appellants raised the question of being denied their rights under the Fourteenth Amendment to the Constitution of the United States, based upon the denial to them of the right to vote upon a question at an election, the results of which would determine, in practical effect, their right to remain out of the City limits.

Appellants next raised the Federal question before proceeding to a trial in the Union County, Arkansas Circuit Court by objecting to being required to assume the burden of proof, based upon the affirmative vote of a majority of the electors in the City of El Dorado, Arkansas.

Appellants next raised the Federal question of the affirmative vote of a majority of the electors within a

municipality making a *prima facie* case for annexation, and alleged that it was in conflict with the Fourteenth Amendment to the Constitution of the United States in a motion for a new trial before the Union County, Arkansas Circuit Court.

Appellants raised a similar Federal question on an appeal to the Supreme Court of Arkansas, and in a petition for rehearing in the Supreme Court of Arkansas.

Appellants' contentions were overruled in every instance except in the County Court of Union County, Arkansas, where their contention was sustained; however, a trial de novo in the Circuit Court of Union County, Arkansas, indirectly reversed the ruling of the County Court.

HENRY B. WHITLEY,
Counsel for Appellants.

EXHIBIT A

4-9320

MARSH *v.* CITY OF EL DORADO

Opinion delivered October 30, 1950

Appeal from Union Circuit Court, First Division; Gus Jones, Judge; affirmed

HOLT, J. April 5, 1949, the electorate of the City of El Dorado, by proper procedure (Ark. Stats. 1947, § 19-307) voted to annex certain contiguous territory. 1,014 voted for annexation and 277 against. Thereafter, August 17th, the City petitioned the County Court to make the order of annexation. September 21st, appellants, as Remonstrants, appeared in the County Court, and after a hearing, the Court denied the City's petition for annexation. On appeal by the City to the Circuit Court, there was a finding in favor of annexation in accordance with the City's petition, and judgment accordingly.

This appeal followed.

For reversal, appellants first contend that the burden of proof was on the City of El Dorado and that the evidence was not sufficient to support the judgment.

The rule is well settled since the early case of Dodson et al. *v.* Mayor and Town Council, Fort Smith, 33 Ark. 508, that the vote of the municipality makes a prima facie case as to the propriety of annexations. There, this court said: "By force of the statute the annexation follows the vote of the city, and the proper formal steps prescribed to be taken in the County Court, unless there be a complaint filed against it and sustained. The vote of the town makes a prima facie case as to the propriety of the annexation. The onus of showing cause against it sufficient to satisfy the judgment of the County Judge, was upon the remonstrants."

This holding has been consistently followed by this Court. Walker *v.* City of Pine Bluff, 214 Ark. 127, 214 S. W. 2d 510; Burton *v.* City of Fort Smith, 214 Ark. 516, 216 S. W. 2d 884; City of Newport *v.* Owens, 213 Ark. 513, 211 S. W. 2d 438.

We have also consistently held that the findings of the Circuit Court, on appeal, in annexation cases, have the same weight as the verdict of a jury and therefore we must affirm the Court's judgment if we find any substantial evidence in support thereof, Walker *v.* City of Pine Bluff, and other cases above.

The correct rule in determining whether contiguous territory should be annexed was clearly set forth in Vestal *v.* Little Rock, 54 Ark. 321, in this language: "That city limits may reasonably and properly be extended so as to take in contiguous lands, (1) when they are platted and held for sale or use as town lots, (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner, (3) when they furnish the abode for a densely-settled community, or represent the actual growth of the town beyond its legal boundary, (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas or water systems, or to supply places for the abode or business of its residents, or for the extension of needed police regulation, and (5) when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation, would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use.

"2. We conclude further that city limits should not be so extended as to take in contiguous lands, (1) when they are used only for purposes of agriculture or horticuiture, and are valuable on account of such use, (2) when they are vacant and do not derive special value from their adaptability for city uses."

We have never deviated from this rule in subsequent opinions. See City of Newport *v.* Owens and Walker *v.* City of Pine Bluff, supra.

The Circuit Court, after hearing a large number of witnesses, found: "The first witness testifying for the city was Frank Burnside. He is an engineer, thoroughly capable and thoroughly respected in this county. He has been the County Surveyor for a long time at public request. Mr.

Burnside went over every area and every tract of ground entirely around the city that is involved in this hearing. He has spent twenty-five years of his life in work of that kind. He testified that there is no piece of ground involved in this area that is not adaptable for city purposes.

"He was followed by the City Engineer, who testified that he is a man of ten years' experience in such work. That all of this property can be furnished with sewer system.

"He was followed by Ex-Mayor Bodenhamer * * *, a man thoroughly capable and thoroughly experienced in real estate matters, and he testified with the exception of two small tracts in the Southeast corner, he is familiar with all the property involved in this lawsuit, and it is all adaptable to city uses. He also testified that El Dorado is a growing city and that there is need for expansion for El Dorado's normal growth. * * *

"I believe from the evidence that all of the property involved is adaptable to city uses, that there is need for expansion and that the prayer for annexation should be granted, and it is so ordered."

We think the testimony supports these findings, is substantial and sufficient to support the judgment.

We do not detail the testimony since to do so would serve no useful purpose. It suffices to say, as indicated, that the testimony of the three witnesses, Mr. Burnside, the City Engineer, and Ex-Mayor Bodenhamer, was substantial and warranted the findings and judgment of the Circuit Court.

Appellants next argue that Sec. 19-307, above, is unconstitutional and say: "Appellants do not contend, and do not want to be understood as contending, that the Legislature could not enact a law under which territory could be brought into a municipality without the consent of a majority of the electors therein, but simply contend that the Legislature has not done so. Appellants do contend, however, that the Legislature cannot enact a law placing the burden of proof on the inhabitants of a territory sought to be annexed, to show that the territory should not be annexed."

The answer to this argument is found in Dodson et al.

v. Mayor and Town Council, Fort Smith, above, wherein Sec. 19-307 above (Act Mar. 9, 1875, No. 1, Sec. 84, p. 1; C. & M. Dig., Sec. 7468; Pope's Dig. Sec. 9501), was construed. It was there held that by force of the statute, annexation must be determined by the vote of the electorate within the town or city.

Appellants argue that we should overrule the Dodson case, but this we decline to do. We hold, therefore, that under the provisions of Sec. 19-307, above, contiguous territory may be brought into a municipality on the vote of a majority of the electors within the municipality only and that section is constitutional.

Next appellants question the sufficiency of the plat which the City filed with its petition and say: "The plat filed fails to show areas that are platted, and shows other areas as platted that actually are not platted; it fails to show roads, and shows other roads or streets that actually do not exist."

We think this contention without merit. Engineer, Frank Burnside, testified positively that the "map is specifically and generally correct." The Circuit Court, therefore, had before it substantial evidence upon which to base its findings, that the plat or map in evidence was sufficient.

Appellants next contend that "the Circuit Court could not properly enter a judgment incorporating the territory in the city, but could only reverse the County Court and remand to that Court for compliance with the provisions of the above statutes."

The effect of our holding in the case of Batesville *v.* Ball, 100 Ark. 496, is against this contention. We there said: "When a cause is appealed from the county court to the circuit court, the latter court obtains jurisdiction over the matter to the same extent as if it had been originally brought in that court, and it must proceed to fully try and determine the cause. It does not pass upon the question as to whether or not the county court has committed error in any of its rulings, either of law or of fact, but it must try the cause upon its merits, both of law and of fact, just as if it had been originally brought in the circuit court. It does not either affirm or reverse the findings or judgment of the county

court, but tries the cause alone upon its merits, and determines the same by the exercise of its own discretion and judgment. It must come to a final determination of the matter, and enter a final judgment thereon. After such final judgment has been made by it, it can then order the same back to the county court with directions to enter such judgment as it has made; but it has no authority to remand the cause with power to the county court to proceed further therein as it may determine."

Here, the Circuit Court made a final determination of the question of annexation and entered a final judgment thereon as it was required to do. If it has not already done so, the trial court should order its final judgment "back to the County Court with directions to enter such judgment, etc."

As pointed out in the above case, the Circuit Court has no authority to remand the cause to the County Court for any further proceedings that that court might determine.

Finally, appellants contend that the petition for annexation was not filed by the City in the County Court within a reasonable time after the election. We cannot agree. It appears that the City waited approximately four months and twelve days before filing its petition in the County Court.

Appellants point to no statute in this State on annexation specifying the time within which a municipality must file its annexation petition after the question has received a favorable vote from the electorate. In such circumstances, the general rule that where no statute of limitations is provided, the law contemplates that the petition (in question here) must be filed within a reasonable time, applies. Appellants have failed to show any such changed conditions since the election as would materially affect their rights as Remonstrants. We hold that the delay pointed out here, in the circumstances, was not unreasonable, that the petition was filed by the City and the County Court within a reasonable time and that appellants have failed to show any abuse of the trial court's discretion in so holding.

Finding no error, the judgment is affirmed.

Filed December 1, 1950.

C. R. STEVENSON,
Clerk.

(2975)

MARCH 5, 1951.

Per Curiam Decisions.

No. 551. MARSH ET AL. *v.* CITY OF EL DORADO. Appeal from the Supreme Court of Arkansas. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Henry B. Whitley* for appellants. *J. A. O'Connor, Jr.* for appellee. Reported below: 217 Ark. 838, 233 S. W. 2d 536.

DARK PAGE BLEED THRU